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To: MSC_clerk@courts.mi.gov
Re: ADM 2005-19

This 18-page document contains much good, significant amounts of bad, and a lot in between. Any thorough response would extend for far more than 18 pages. This is intended as an "executive summary" of comments on the highlights of this proposal.

I suggest that it is counterproductive to try to squeeze into one rule procedures appropriate for a complex Circuit Court civil trial and a District Court misdemeanor trial. That said, there is much that has universal application, but we still need separate rules for details that are court or case specific.

Allowing jurors to submit questions (in writing) to the judge (who can confer with counsel at sidebar) with the judge asking, or paraphrasing, any appropriate questions to the witness, is a good idea. Jurors should be advised to let the attorneys ask their questions, and only submit questions that have not been asked or answered, but to do so before the witness leaves.

The right and power of judges to comment on the evidence is an important right, but it should be used with great restraint because the potential for inducing reversible error is so great.

The use of a reference notebook for each juror, with copies of stipulated (or previously ruled admissible) exhibits has been very helpful in long, complicated civil cases. I very much question inserting statutory material, because much irrelevant material may be included and prior judicial interpretation may have radically changed the "plain English" meaning of the text. The judge rules on the law, the jury on the facts. The use of such a notebook is unnecessary and would unduly complicate at least 90+% of all jury trials. Argument should not be allowed to be included.

Allowing jurors to ask for a view is not a problem, as long as the judge only allows a view where there is a reason and the benefits outweigh the dangers. In all too many situations the word "danger" is more accurate than "costs" of time and expense.

Permitting jurors to take notes has enormous dangers, as repeated psychology experiments have shown, and is of no value in any properly tried case. Any specific fact or number would be found on an exhibit, if it were necessary.

I have never given copies of the preliminary jury instructions to the jurors, but if it were to be required, it would probably not be too great a burden, though of little value.

Psychology experiments have shown that once a person expresses a feeling or opinion to others it is very hard to get the person to change that opinion. This change would be a huge help to prosecutors and plaintiffs. Its effect is too one sided.

I have never had a civil plaintiff's counsel fail to make an opening statement, so I see no problem with requiring one.

"Summaries of depositions" ? Whoever thought of that idea? Next we might have summaries of testimony proposed. If much irrelevant material is included (no surprise there) the attorneys can either agree to cut out the junk, or get the judge to rule out improper stuff or clean up their future deposition practice if they are putting jurors to sleep.

I believe all judges try to accommodate expert's schedules, but when we get to expert witnesses questioning other expert witnesses we have turned witnesses into advocates. Some experts verge very close to the line now, and some experts act as if they are on a contingent fee basis. We need to keep the judge in control of the courtroom, not the lawyers and certainly not the "hired gun" expert witnesses.

"Interim commentary" by counsel inserts argument at inappropriate times and may well be treated by jurors as testimony - because jurors may not distinguish the difference.

Giving each juror full copies of the final jury instructions so they can read as the judge is reciting the same text is a wonderful idea. It certainly is not a new idea; the National Judicial College has recommended this for nearly 30 years. I have done this for every jury trial for the last 25 years and the jurors love it. They have been unanimous in praising the fact that every one of them had the same text. The objection from some judges has been "It's too much work." Not so! I type with two fingers, and slowly. I personally draft final jury instructions in a half hour and leave a copy on counsel tables at the end of the day before the trial. At the start of the trial, before the jury is in the room, I make a record that they have the instructions and request that all errors, omissions, etc should be given to me as soon as possible. I renew this request at every recess. Any necessary or appropriate changes are made and revised copies distributed at the next recess. At the end of the testimony I ask if the instructions are acceptable as printed, (99.9% of the time they are) we take a recess for a bathroom break and resume with argument, followed immediately by the bailiff handing out copies to all jurors, and I begin reading.

The benefits are: much less total time wrangling over instructions, much faster deliberation times, better verdicts (though that could only be a marginal improvement), and when I talk to jurors after they have been discharged, the reasons for their verdicts have been the right reasons. Verdicts based on prejudice or other inappropriate bases have disappeared. Appeals based on claimed instruction errors have also disappeared.

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